

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
REPLY BRIEF**

74-1737

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

-against-

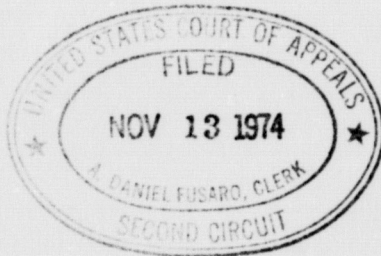
PHILIP TRAVERS,

Appellant.

Docket No. 74-1737

REPLY BRIEF FOR APPELLANT

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK



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The District Court dismissed appellant Travers' petition for a writ of error coram nobis on the ground that Travers' criminal conviction and the record of that conviction did not constitute "adverse legal consequences" sufficient to provide the basis for relief by such a writ. Travers has appealed that determination to this Court, filing his brief on appeal on July 12, 1974. On August 6, 1974, the Government filed a motion with this Court requesting a thirty-day extension of time in which to file its brief, stating that the chief appellate attorney of the United States Attorney's office for the

Southern District of New York "believe[s] that Travers's [sic] claim on appeal has merit and that there is considerable question whether his conviction was valid." The chief appellate attorney stated in his affidavit that he was requesting the extension of time in order to refer the matter to the Solicitor General of the United States for final determination of the Government's position in this appeal, and stated to Travers' counsel that he was requesting the Solicitor General to allow him to confess error in this case. After further delay, the Government elected to file a brief in this case for the stated reason that the Solicitor General was dissatisfied with having lost United States v. Maze, 414 U.S. 395 (1974), and wished to attempt to prevent the retroactive application of that decision sought by Travers in this case.

In its brief on appeal the Government makes no argument in support of the District Court's finding of "no adverse legal consequences," but instead argues solely that the Supreme Court's decision in United States v. Maze, supra, should be denied retroactive effect. However, a careful examination of the law on this issue demonstrates the insubstantiality of the Government's claims.

A. A Supreme Court decision on the statutory construction of a criminal statute which would invalidate a prior conviction must be applied retroactively.

In United States v. Maze, supra, 414 U.S. 395, the Supreme Court held that the prior decisions of this and certain other circuits as to the scope of the Federal mail fraud statute were incorrect, that the scope of that statute was in fact narrower than those circuit courts had envisioned. The Government concedes that if Maze is applied retroactively, Travers' conviction must be vacated (Government's Brief at 3). The Government argues, however, that Maze is a decision of statutory construction and that Supreme Court decisions on statutory construction are not given retroactive effect (Government's Brief at 6).

The Government fails, however, to cite a single case in which a Supreme Court decision on the statutory construction of a criminal statute which would invalidate a prior conviction has been denied retroactive application. In fact, no such case exists. To the contrary, decisions by the Supreme Court or the courts of appeals which have considered the retroactivity of decisions of statutory construction which would invalidate a prior conviction have invariably granted such decisions retroactive application. As another circuit noted, in concluding that such decisions must be applied retroactively:

At no time has [the Supreme Court] denied retroactive application to a statutory interpretation which would invalidate a prior conviction. The Government has cited no case, and we find none, where a statutory interpretation by the Supreme Court was denied retroactive application in a criminal conviction.

Brough v. United States,
454 F.2d 370, 372 (7th Cir.
1971). Emphasis added.

The cases applying Leary v. United States, 395 U.S. 6 (1969), retroactively are on point and should be considered dispositive of the current proceeding. In Leary, the Supreme Court held that mere evidence of possession of marijuana was insufficient to satisfy the element of the crime that the defendant must know that the drug in his possession was imported. The Supreme Court subsequently held that the Leary decision was to be applied retroactively even to defendants whose direct appeals were completed before the Leary decision. See, e.g., Castro v. United States, 403 U.S. 903 (1971); Miller v. United States, 402 U.S. 939 (1971).^{*} Similarly, this and other Circuits accorded Leary full retroactive application. In United States v. Liguori, 438 F.2d 663 (2d Cir. 1971), this Court found that since Leary held that mere possession of marijuana was insufficient to establish that the possessor had knowledge of its importation, the Government had failed to introduce any

^{*}In both Castro and Miller, the Supreme Court, citing Leary and United States v. United States Coin & Currency, 401 U.S. 715 (1971), reversed the lower courts' decisions denying applications pursuant to 28 U.S.C. §2255. Those applications requested reversals of judgments of conviction on the ground that Leary was retroactive.

evidence of that requisite element of the crime. Leary, this Court reasoned, therefore had to be applied retroactively because a conviction on a record which disclosed no proof of an element of the crime charged "has a fatal constitutional taint for lack of due process of law." Id., at 669. For other cases explaining the retroactive application of Leary, see, e.g., Martinez v. United States, 464 F.2d 1289 (10th Cir. 1972); Vaccaro v. United States, 461 F.2d 626 (5th Cir. en banc 1972); United States v. Scott, 425 F.2d 55 (9th Cir. 1970).

Maze likewise presents a situation where the evidence presented by the Government was insufficient to establish a crucial element of the crime charged. In Maze, the Supreme Court held that in cases involving the misuse of credit cards, the merely incidental and subsequent mailings of invoices was not sufficient to satisfy the element of the crime which requires that the defendant make a knowing use of the mails for the purpose of executing the fraud. In Travers' case, there was no other evidence of that element of the crime of mail fraud. Consequently, constitutional due process, as defined by this Court in Liguori, requires that Travers' conviction be vacated. See In re Winship, 397 U.S. 358 (1970); see also Appellant's Brief on Appeal at 15).

The Government seeks to distinguish the retroactive application of Leary from the present proceeding by claiming that Leary's retroactivity was obligatory because the prior convictions were predicated on a "constitutionally infirm statutory

presumption" which was relied upon by the Government to establish certain elements of the crime charged, whereas the Maze decision involved "no such constitutional dimension" (Government's Brief at 17). There is no such distinction. As the Government itself acknowledges, the only constitutional infirmity recognized in Leary was the due process violation arising from a conviction on a record in which there was no proof of one or more elements of the crime charged (Government's Brief at 17; see also Leary v. United States, supra). This, of course, is the same constitutional infirmity which forms the basis for the Maze decision. Thus if, as the Government concedes, such a constitutional infirmity mandates retroactive application, then Maze, like Leary, must be applied retroactively.

As with Leary, the Federal courts have given full retroactive effect to every other Supreme Court decision which has narrowed a lower court's determination of the scope of a criminal statute or held that certain evidence was insufficient to establish an element of the crime. Thus, for example, in 1970 the Supreme Court, in Welsh v. United States, 398 U.S. 333, held that a Selective Service registrant could not be denied conscientious objector status merely because his beliefs were "non-religious." This decision had the indirect effect of narrowing the scope of 50 U.S.C. App. §462(a), which makes it a crime for anyone to refuse induction, since, by virtue of Welsh, registrants whose non-religious conscientious objector claims were improperly rejected by their Selective Service

boards no longer violated that provision by refusing induction. Welsh was subsequently accorded full retroactive effect (see, e.g., United States v. Fagnoli, 458 F.2d 1237 (1st Cir. 1972)), because it involved, as does the Maze decision, "the very definition of a crime." Id., at 1238. For other cases applying decisions of statutory interpretation retroactively, see, e.g., Brough v. United States, supra; United States v. Jones, 447 F.2d 589 (7th Cir. 1971); Norwood v. Jacobs, 430 F.2d 903 (D.C. Cir. 1970); United States v. Stolberg, 346 F.2d 363 (7th Cir. 1965); Foster v. United States, 320 F.Supp. 646 (D.Conn. 1970); United States v. Rumon, 315 F.Supp. 1136 (W.D.Pa. 1970); United States v. Kelly, 314 F.Supp. 500 (E.D.N.Y. 1970); Andre v. Resor, 313 F.Supp. 957 (N.D.Cal. 1970), affirmed, 443 F.2d 921 (9th Cir. 1971).

In requesting this Court to deny retroactive application to United States v. Maze, supra, the Government places itself in the untenable position of asking that this Court repudiate the theory of retroactivity it enunciated in United States v. Liguori, supra, and ignore the precedents of the Supreme Court and Courts of Appeals in every single case involving the retroactive application of decisions of statutory interpretation to prior convictions. In addition to the due process violation just discussed, to honor such a request would be to render activity which was not a crime for Maze a crime under the same statute for Travers (United States v. Fagnoli, supra, 458 F.2d at 1238), thereby denying Travers his constitutional right to

equal protection under the law. Cf. Johnson v. Arizona, 462 F.2d 1352, 1354 (9th Cir. 1972).

B. The Government's analysis of prior decisions on retroactivity is invalid.

In its brief the Government conjures up a novel theory of retroactivity which is not even supported by the cases it cites.

The Supreme Court acknowledges a general principle of retroactivity at common law and in the decisions of the Court. Robinson v. Neil, 409 U.S. 505, 507-08 (1973); see also Norton v. Shelby County, 118 U.S. 425, 442 (1886). In Linkletter v. Walker, 381 U.S. 618 (1965), however, the Court took occasion to carve a single clearly defined exception to the general principle of retroactivity for those cases which established new constitutional rules of criminal procedure. Robinson v. Neil, *supra*, 409 U.S. at 507-08. The result of Linkletter was that those decisions establishing new constitutional rules of criminal procedure which affected "the very integrity of the fact-finding process," thereby raising a substantial question as to the validity of the determination of guilt in prior trials, should be accorded retroactive effect, whereas those new rules which were designed merely to curtail police misconduct or failed to raise any substantial question to prior defendants' guilt of the crimes charged were not to be applied retroactively.

In Linkletter and the subsequent retroactivity cases, however, the Supreme Court has left unaltered the general principle

of retroactivity as it applies to decisions other than those establishing new constitutional rules of criminal procedure. The Government concedes this fact insofar as decisions creating a constitutional bar to prosecutions are concerned. It attempts, however, to draw an artificial distinction between such decisions and decisions which create a "statutory" bar to prosecution.*

This distinction is invalid. Decisions acknowledging statutory bars to prosecution have invariably been accorded retroactive application (see Point A, supra) because of their constitutional implications. The constitutional implications in this case are that defendants such as Maze and Travers were convicted without any proof of an element of the crime charged, in clear violation of constitutional due process protections.** In re Winship, supra; United States v. Liguori, supra.

In the face of unvarying adherence by the courts to the principle that decisions of statutory interpretation must be accorded retroactive application to prior convictions, the Government cites only a single case, United States v. Alexander, 498 F.2d 934 (2d Cir. 1974), which it claims stands for the

*Appellant Travers interprets the Government's use of the phrase "statutory bar to prosecution" as designating cases such as the present proceeding where the Supreme Court decision of statutory interpretation, if applied retroactively, would invalidate certain prior convictions.

**Another constitutional implication of the Maze decision is that the element which the Government failed to prove was the very element which provided the requisite Federal connection to the crime charged.

principle that such decisions are not to be applied retroactively. However, Alexander stands for no such principle. In Alexander, this Court held that the Supreme Court's decision in Miller v. California, 413 U.S. 15 (1973), clarifying the standards to be applied in obscenity cases, was not to be applied retroactively. This Court based its decision, though, on its determination that Miller did not create a statutory bar to prosecution which would have invalidated Alexander's conviction. To the contrary, this Court found that Miller broadened the pre-existing definition of obscenity (id., at 935; see also United States v. Thevis, 484 F.2d 1149, 1154 (5th Cir. 1973), relied upon by the Second Circuit in Alexander). To give such a decision retroactive effect would be to establish an ex post facto law. Consequently, Alexander provides no support whatsoever for the Government's claim that decisions creating a statutory bar to prosecution should not be applied retroactively.

The Government also attempts to strengthen its argument by equating cases recognizing a statutory bar to prosecution with those announcing new constitutional rules of jurisdiction, citing this Court to Gosa v. Mayden, 413 U.S. 665 (1973). In Gosa, the Supreme Court held non-retroactive the decision in O'Callaghan v. Parker, 395 U.S. 258 (1969), which declared that military tribunals were without jurisdiction to try non-service connected offenses. In reaching this conclusion, the Court stressed that O'Callaghan was not a clarification of statutory

interpretation, but rather the declaration of a "new constitutional principle." Thus, the Court held that it was not overruling its long line of cases recognizing military jurisdiction over non-service connected offenses by military personnel (id., at 2932-2935), and that it was not holding

... that a military tribunal was and always had been without authority to exercise jurisdiction over a non-service connected offense.

Id., at 2935.

O'Callaghan raised no question as to the integrity or fairness of prior military proceedings (id., at 2933). Rather, it sought to extend the Fifth and Sixth Amendment protections of civilian proceedings to military personnel accused of non-service related offenses (id., at 2933-2934). As such, it constituted a "clear break with the past" (id., at 2932).

In Gosa, the Court found that O'Callaghan, while not exactly setting forth a new constitutional rule of criminal procedure, as in Linkletter and Stovall v. Denno, 388 U.S. 293 (1967), was more closely related to decisions enunciating new constitutional principles affecting the conduct of criminal proceedings (citing DeStefano v. Woods, 392 U.S. 631 (1968) (right to trial by jury)), than it was to decisions recognizing a bar to prosecution (citing Robinson v. Neil, supra). Id., at 2935-2936; see also United States v. United States Coin & Currency, supra; United States v. Liguori, supra. Consequently, the Court concluded that O'Callaghan was not subject to the general principle of retroactivity applied to cases recognizing

bars to prosecution (Robinson v. Neil, supra; United States v. United States Coin & Currency, supra; United States v. Liguori, supra), but rather fell into that category of exceptions to the general principle of retroactivity recognized in Linkletter, and was therefore an appropriate subject for the application of the Linkletter-Stovall test. Since United States v. Maze, supra, does involve a bar to prosecution, Gosa is not controlling in the present proceeding.

The Government makes yet a further argument in connection with the O'Callaghan-Gosa decisions. As previously explained, O'Callaghan enunciated the principle that it would be better for Fifth and Sixth Amendment purposes for military personnel charged with non-service connected offenses to be tried in civilian courts. Gosa held that since O'Callaghan set forth a new constitutional principle and did not question either the integrity of prior military proceedings or the validity of convictions by those tribunals, O'Callaghan would not be applied retroactively. The Government seeks to analogize that holding to the present proceeding by claiming that United States v. Maze, supra, merely stands for the principle that cases of credit card fraud are more appropriate for trial by state rather than federal courts. It was, according to the Government, merely an erroneous "choice of forum" which led to the Maze decision, and not a question of the integrity of the prior proceedings or the validity of the prior convictions. This claim constitutes a gross distortion of the holding of United

States v. Maze, supra.

The focus of Maze was not the Government's erroneous choice of forum, but rather its failure to present evidence as to an element of the crime charged. The possibility that Travers might have been tried in a state court for credit card fraud is irrelevant to this proceeding. The inescapable fact is that his conviction rests on a record in which the Government failed to prove an essential element of the crime charged. No fact could be more central to the question of the integrity of the proceedings or the validity of Travers' conviction. In the cases applying Leary retroactively, the mere fact that those defendants might have been prosecuted in state courts for drug offenses, thereby avoiding the need for the prosecutor to prove knowledge of importation, was not found to impede the retroactive application of Leary. See, e.g., United States v. Liguori, supra. It likewise cannot impede the retroactive application of Maze.

Finally, the Government argues that application of the Linkletter test compels denial of retroactivity to United States v. Maze, supra. The Supreme Court has repeatedly held that Linkletter, which pertains solely to the question of retroactivity of decisions announcing new constitutional rules of criminal procedure, is inapplicable to the question of retroactivity of other decisions, such as those recognizing a bar to prosecution. See, e.g., Robinson v. Neil, supra, 409 U.S. at 503; Gosa v. Mayden, supra, ___ U.S. ___, 93 S.Ct. at 2935;

United States v. United States Coin & Currency, supra, 401 U.S. at 723. However, if the Linkletter test were applied to the present proceeding, it would clearly compel the retroactive application of the Maze decision.

The three criteria to be weighed in determining retroactivity under Linkletter are "(a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (3) the effect on the administration of justice of a retroactive application of the new standards." Stovall v. Denno, supra, 338 U.S. at 297. The Supreme Court has made clear, however, that the first of the criteria -- the purpose of the decision -- is the principal consideration, and that the other two criteria are to be considered only where the purpose does not dictate retroactivity. Desist v. United States, 394 U.S. 244, 249-251 (1969). Accordingly, where the purpose of the decision is to correct a serious flaw in the fact-finding process and therefore goes to the basic integrity and accuracy of the guilt-innocence determination, retroactivity must be accorded, regardless of the other two factors. See, e.g., McConnell v. Rhay, 393 U.S. 2 (1968); Roberts v. Russell, 392 U.S. 293 (1968); Witherspoon v. Illinois, 391 U.S. 510 (1968); Jackson v. Denno, 378 U.S. 368 (1964); Gideon v. Wainwright, 372 U.S. 335 (1963); Griffin v. Illinois, 351 U.S. 12 (1956); Linkletter v. Walker, supra.

In the present proceeding the Government failed to prove



an element of the crime charged. This fact does not merely create a "serious risk that the issue of guilt or innocence may not have been reliably determined" (Roberts v. Russell, supra, 392 U.S. at 295); rather, it establishes irrefutably that Travers was not proved guilty of the crime charged. Thus, regardless of the "reliance" or court congestion factors, this consideration alone mandates the retroactive application of United States v. Maze, supra, under the Linkletter test.

Conclusion

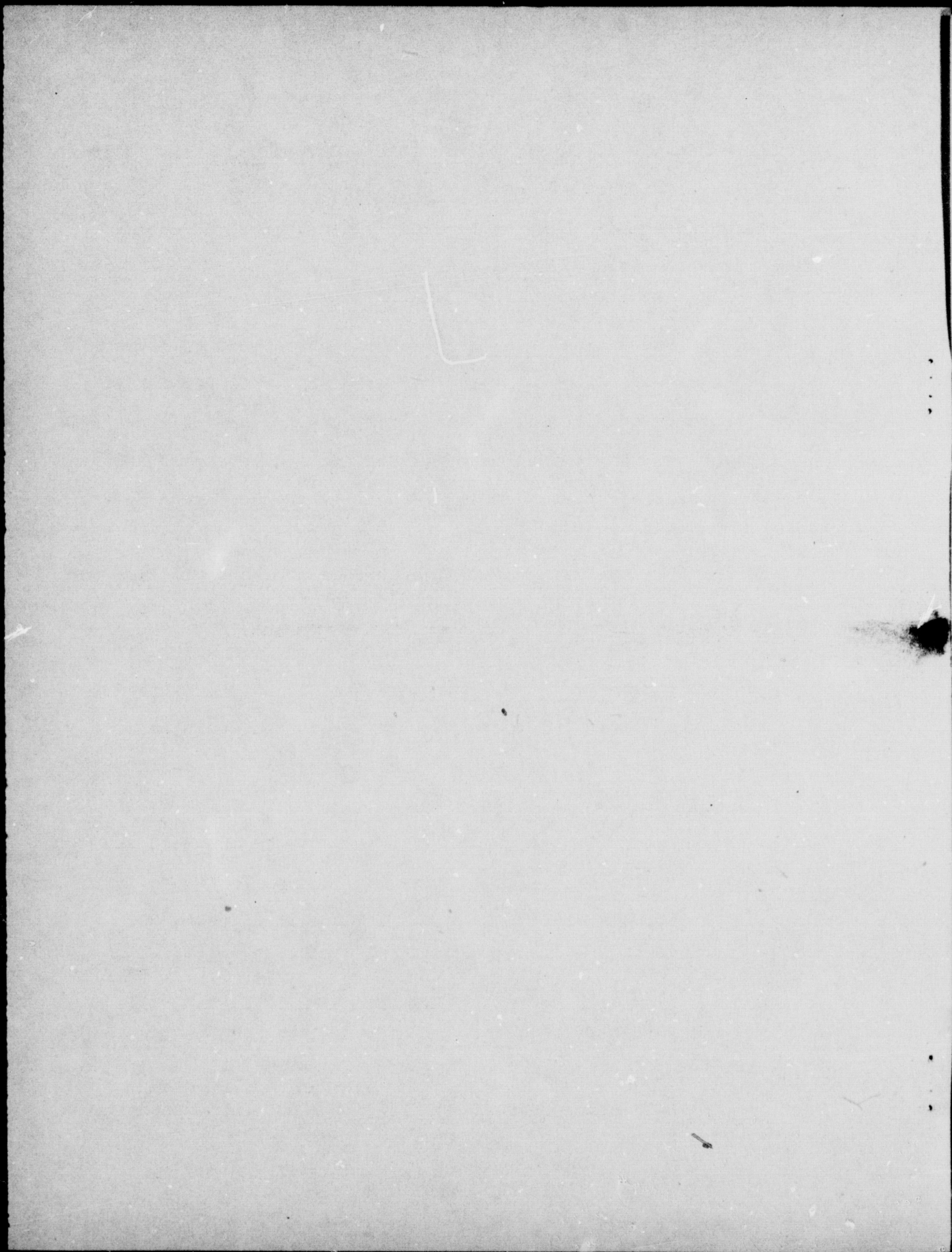
For the above-stated reasons and the reasons set forth in the main brief for appellant, the judgment of the District Court should be reversed and an order entered vacating the conviction and expunging the record.

Respectfully submitted,

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November 11, 1974



Certificate of Service

November 11, 1974

I certify that a copy of this reply brief has been served on the United States Attorney for the Southern District of New York.

Mrs. D.A. Y-7